No. 90-635

In The

Supreme Court of the United States

October Term, 1990

NAVAJO TAX COMMISSION,

Petitioner,

v.

THE PITTSBURG & MIDWAY COAL MINING CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Was reservation status for the 709/744 area terminated where:

(1) the President added the 709/744 area to the Navajo Reservation temporarily and for a limited purpose;

(2) Congress directed that the area be restored to the public domain as soon as that purpose was fulfilled; and

(3) the President then restored the area to the public domain?

AFFILIATED CORPORATIONS

The Pittsburg & Midway Coal Mining Co. is a Missouri corporation. It has no subsidiaries. Its parent is Chevron Corporation, a Delaware corporation.

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The Pittsburg & Midway Coal Mining Co. ("P&M") respectfully asks that this Court decline to issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered on May 30, 1990, and amended thereafter.

STATEMENT OF THE CASE

Petitioner (the "Commission") seeks to bring before this Court a straightforward issue of Indian reservation diminishment under *Solem v. Bartlett*, 465 U.S. 463 (1984), and its predecessors.[1] In diminishment cases, the operative language of the statute and the jurisdictional history of the area, particularly in the period leading up to the terminating legislation or executive order, are critical. The Commission's Statement of the Case omits a number of historical facts material to consideration of the question presented. This response will highlight significant events from that history, but will rely principally on the court of appeals' thorough and detailed presentation of the historical facts.

A. The Surrounding Circumstances and Legislative History: The 709/744 Area from its Addition to the Reservation in 1907 to its Termination as Reservation by 1911

1. The Creation: In 1907 the Executive Established a Temporary Addition. (Pet. 6a-10a, 47a-52a.)[2]

The area in issue ("the 709/744 area") was added to the Navajo Reservation temporarily by Executive Order

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[1] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); and *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). These cases variously use the terms reservation "diminishment," "termination," or "disestablishment" to refer to government action eliminating all reservation status for an area.

[2] Citations to the court of appeals' decision will be to pages in the Appendix to the Commission's Petition.

709 issued in November 1907.[3] At that time, a number of Navajos were living outside their reservation on public domain lands. They had no property rights in these lands, and conflicts occurred as white ranchers moved into the area. In March 1907, the Superintendent responsible for the Navajos, W.H. Harrison, sought an extension of the reservation to the east and south to protect these off-reservation Indians. His superiors rejected this request. In the summer of 1907, the Navajos renewed the request for a reservation extension when they met with Commissioner of Indian Affairs Leupp in council at the reservation. In response, Leupp told the Navajos and their advocate, Father Anselm Weber:

> I should be unwilling to recommend to the President any such extension except for the purpose of withdrawing this land from white settlement till the Indians on it could be allotted their holdings and thus protected, but that on that basis I would lay the matter before the President . . . .

Letter from F.E. Leupp to W.H. Harrison (Aug. 29, 1907) (Ex. 13).

This explicit refusal to make a permanent addition to the reservation, but instead to create a temporary extension until the government could make allotments to the

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[3] Executive Order 709 was modified by Executive Order 744, issued in January 1908, to avoid a land conflict with another reservation. The texts of these and of Executive Orders 1000 and 1284, cited later, appear at pages 136a-139a and 141a-143a, respectively, of Petitioner's Appendix.

public domain Navajos,[4] was demonstrated consistently throughout the executive branch decision-making process leading to the issuance of Executive Order 709 in November 1907. This intention is confirmed in: (1) Commissioner of Indian Affairs Leupp's meeting with the Navajos in council (Ex. 13); (2) communications between the Commissioner and Father Weber (Ex. 14); (3) the November 6, 1907 formal recommendation from the Commissioner to Secretary of the Interior Garfield asking him to submit the proposal to President Roosevelt (Ex. 15); and (4) the materials submitted by the Secretary of the Interior to the President supporting the formal recommendation for issuance of an executive order (Ex. 16).

2. Congressional Action: The Legislative History of the 1908 Act Confirms That This Was Only a Temporary Addition. (Pet. 10a-12a, 52a-53a.)

New Mexico citizens and government officials opposed the new addition. The Indian Office, the Secretary of the Interior, and the President responded to these objections consistent with the intent first communicated to the Navajos in the summer of 1907:

> It is not intended that this is to be a permanent addition, but that it continue only until the

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[4] The allotment process gave individual Indians (as opposed to tribes) 160-acre parcels. While it was possible to make allotments to Indians living outside a reservation on the public domain, the process was substantially easier and more protective of the Indians if the lands to be allotted were in reservation status. (Pet. 51a-52a.)

> Indians residing on lands within the area added can be allotted. . . .

Letter from Commissioner of Indian Affairs to W.H. Andrews (Jan. 18, 1908) (Ex. 19).

> [T]he action is merely temporary and solely for the purpose of permitting the allotment of the Indians . . . .

Letter from Assistant Secretary of the Interior (written for the Secretary and for the President) to W.H. Andrews (Jan. 30, 1908) (Ex. 20).

At the request of W.H. Andrews, the New Mexico territorial delegate to Congress, Commissioner Leupp drafted a joint congressional resolution to direct the President to restore the unallotted lands in the temporary addition to the public domain as soon as the allotment process was completed. The House Committee on Indian Affairs asked the Interior Department Office of Indian Affairs for a report on the proposed legislation. The report to Congress, submitted by Acting Commissioner Larrabee, stated:

> [I]t was necessary, in order to protect them [public domain Navajos] in their homes, that a temporary reservation of the lands be made until such time as the Indian occupants could be allotted. . . .

H.R. Rep. No. 1663, 60th Cong., 1st Sess. 1-2 (1908). The House Report adopted Larrabee's letter as "authenticat[ing] the virtue of this resolution." *Id.* at 1. The Senate Report was virtually identical. *See* S. Rep. No. 681, 60th Cong., 1st Sess. 15-16 (1908). Congress then enacted into law the resolution drafted by the Indian Office. This directed:

> That whenever the President is satisfied that all the Indians in any part of the [709/744 area] have been allotted, the surplus lands in such part of the reservation shall be restored to the public domain and opened to settlement and entry by proclamation of the President.

Act of May 29, 1908, ch. 216, § 25, 35 Stat. 444, 457. By this law Congress confirmed the original and consistent executive branch purpose that this would be a temporary addition for a limited purpose.

3. The Termination: The Executive Carries Out the Congressional Intent in 1908 and 1911. (Pet. 12a-13a.)

The Executive carried this congressional intent to completion. On December 30, 1908, President Roosevelt issued Executive Order 1000 restoring the eastern one-third of the 709/744 area in New Mexico to the public domain. In 1909, the new Taft administration took office. Indian advocates petitioned that administration not to terminate the balance of the 709/744 area, but to leave those lands permanently in reservation status. The new administration reviewed the history of the area, including the rationale for the temporary addition and the intent of the Act of 1908, and refused to modify the existing policy. In January 1911, thirty-eight months after the creation of the temporary addition, President Taft issued Executive Order 1284 restoring the balance of the area in New Mexico to the public domain.[5]

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[5] The Arizona portion of the 709/744 area was not restored to the public domain and is not at issue in this action. Discussions in this brief of the post-1911 status of the 709/744 area refer only to the New Mexico area.

From the creation of this temporary addition in November 1907 to its final termination in January 1911, Congress and the Executive had a consistent and unwavering intent: this would be a temporary addition, for a limited purpose – to make allotments to individual Navajos – and for a limited time – to last only until those allotments were made.

B. Subsequent Actions by Congress and the Executive: 1911-1938. (Pet. 54a-80a.)

The court of appeals summarized the subsequent history very aptly: "[I]n the decades following EOs 1000/1284, Congress and the Interior Department continued to view the 709/744 area in New Mexico as cancelled reservation." (Pet. 54a.) As the court noted, the evidence on subsequent treatment is mixed. There were references to the area as "reservation" in some appropriations legislation and in some executive branch documents. But the court concluded that these "pale in the face of consistent official pronouncements that the 709/744 area lacked reservation status." (Pet. 55a.)

Specifically, these official pronouncements included:

1. On a number of occasions in the years immediately following the restoration of the 709/744 area to the public domain, the government needed to have particular lands within that area in reservation status – for land exchanges with the railroad, for use for reservoirs, and for other purposes. In each case, the executive branch issued new executive orders re-reserving the lands. (Pet. 55a-63a.)

2. The Superintendent responsible for the area, the Commissioner of Indian Affairs, the Board of Indian Commissioners, the Special Commissioner to the Navajo Tribe, and the leader of the Navajos all addressed the issue of the status of this area in reports or correspondence after 1911. They uniformly stated that this area was not reservation. (Pet. 58a-59a n.30, 64a-68a.)

3. The Indian Office, Navajo leaders, executive branch officials, and members of Congress made numerous attempts between 1918 and 1938 to extend the boundaries of the Navajo Reservation in New Mexico to include a substantial part of the 709/744 area. These repeated efforts were unsuccessful. Throughout this process, no one suggested that any part of the area continued in reservation status. (Pet. 66a-71a.)

4. Congress also passed legislation confirming that the 709/744 area was not in reservation status after 1911. In 1918, aware of efforts by Navajos and their advocates to obtain an executive order restoring a significant part of the 709/744 area to reservation status, Congress withdrew the Executive's power to make reservations in New Mexico and Arizona. Act of May 25, 1918, ch. 86, § 2, 40 Stat. 561, 570 (codified at 25 U.S.C. § 211 (1988)). (Pet. 59a n.31.) In 1921, Congress passed a law to allow exchanges of railroad lands within the 709/744 area (and certain other areas in New Mexico) to consolidate the lands for the Navajos. Act of Mar. 3, 1921, ch. 119, § 13, 41 Stat. 1225, 1239. This legislation would not have been necessary for the 709/744 area if the lands still had reservation status, because existing laws already permitted exchanges of railroad lands within a reservation. (Pet. 57a n.30.)

C. Subsequent Demographics: Three Governments Cooperate Within the 709/744 Area. (Pet. 81a-82a.)

The 709/744 area is a classic checkerboard, *i.e.*, an area of mixed title and jurisdiction in which three governments – federal, state, and tribal – cooperate in providing services. A majority, but by no means all, of the surface area is comprised of allotments, lands owned by the Navajo Tribe in fee, and other non-reservation land acquired by the United States for the tribe or leased to the Navajos for grazing. Significantly, within this area: (1) the Navajo Tribe acknowledges state jurisdiction by paying property tax under New Mexico law on fee-owned land (Tr. 68-69, 1775-76); and (2) the tribe administers grazing activities on its owned or leased lands under its "Off Reservation Grazing Code," through "Off Reservation District Land Boards," consistent with formal cooperative agreements with federal agencies which acknowledge that these lands are off of the Navajo Reservation. (Ex. 153, 155, 155a, 155b.)

Criminal jurisdiction in the area is mixed among the FBI, the Bureau of Indian Affairs, the Navajo Tribe, the New Mexico state police, and the sheriffs of the New Mexico counties. Consistent with 18 U.S.C. § 1151-1153 (1988), federal and tribal police exercise criminal jurisdiction over allotments and other trust areas. Significantly, the Navajo police have obtained commissions under New Mexico law so tribal officers can act outside the trust lands within the 709/744 area. (Ex. 341; Tr. 638-44, 1655-56, 1708-13.)

The three governments also fund social services in the area, although New Mexico is by far the predominant provider of those services. New Mexico educates the vast majority of students in its public schools. The state school districts in which the 709/744 area is situated spend more than $113 million annually on education for a predominantly Indian school population. (Tr. 1728-32.) New Mexico and the federal government spend more than $20 million on major social service programs (whose clients are 75% Navajo) in just one of the three counties of the 709/744 area, and offer comparable programs in the other counties. (Ex. 476; Tr. 1884-94.) The Navajo Tribe Division of Social Welfare has a budget of $6,800,000 for the Eastern Navajo area, and most of this is federal money administered by the tribe. (Ex. YA; Tr. 567-68.)[6]

The record of government services to the 709/744 area confirms what the court of appeals stated:

> Over the decades, New Mexico, the federal government, and the Tribe have carved out differing

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[6] The Commission's statements that the Navajo Tribe spends more than $41 million for social services and that the tribe and the BIA spend in excess of $65 million in the area (Pet. 13) are misleading. The Navajo Nation's entire budget for social welfare for 1988 was $41 million. $37 million of this was federal funds; $1.8 million was state funds. (Ex. YA.) This budget had to serve the needs of Navajos throughout the Tribe's 11.5 million-acre reservation and all the surrounding off-reservation areas. The $65 million figure appears to result from combining the social welfare budget of $41 million and the BIA education budget for the Eastern Navajo area of $24 million. (Pet. 123a.) A similar combination of state spending on these functions would give a figure substantially in excess of $133 million.

and sometimes overlapping responsibilities for provision of government services in such fields as education, social services, health, and water and mining regulation; the acts of carving out these responsibilities suggest past understanding on the part of all parties that the area has checkerboard and not reservation status. (Pet. 82a.)

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS FAITHFULLY FOLLOWED THE ANALYTICAL FRAMEWORK ESTABLISHED BY THE SUPREME COURT IN *SOLEM V. BARTLETT* AND ITS PREDECESSORS. IT CONDUCTED A COMPREHENSIVE, FACT-SPECIFIC ANALYSIS AND CONCLUDED THAT THE OPERATIVE LANGUAGE OF THE 1908 ACT, COUPLED WITH THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES, TERMINATED ALL RESERVATION STATUS FOR THE AREA.

In a series of five decisions issued between 1962 and 1984, this Court established a cohesive analytical framework for determining whether an area has been terminated as a reservation.[7] As background, in the late 1800's and early 1900's congressional policy was to make allotments to individual Indians from reservation lands and then open the balance of those lands to settlement by

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[7] *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962).

non-Indians. In recent years, questions have arisen as to the status of these "opened" lands. Was reservation status terminated altogether or did reservation boundaries remain, with only Indian title extinguished so that non-Indians could settle within the reservation? Congress rarely specified an answer in the original legislation.

This Court has declared that congressional intent at the time of the relevant actions is the overriding standard for determining reservation termination. *E.g., Solem v. Bartlett*, 465 U.S. 463, 470 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-88 (1977). If Congress intended that an area should cease to be reservation, reservation status would be terminated; if Congress intended merely that some reservation lands should be sold or opened to settlement, then reservation status would continue, with only Indian title being lost.

Determination of congressional intent requires a fact-intensive analysis of government action toward the particular area. The "most probative evidence" is the operative language of the statute or executive order. *Solem v. Bartlett*, 465 U.S. at 470. If the operative language is not conclusive, then it is necessary to review the legislative history and surrounding circumstances. *Id.* at 471; *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975). These two factors – operative language and legislative history/surrounding circumstances – are the primary determinants of congressional intent. "To a lesser extent," a court may look at subsequent legislative and executive actions and at subsequent demographic information as having some relevance to that intent. *Solem v. Bartlett*, 465 U.S. at 471-72. As the court of appeals stated, however, "these latter factors [subsequent history and demographics] will not substitute for failure of 'an Act and

its legislative history . . . to provide substantial and compelling evidence of a congressional intention to diminish Indian lands.' " (Pet. 20a-21a (citing *Solem v. Bartlett*, 465 U.S. at 472).)

The court of appeals faithfully, indeed meticulously, applied this Court's analytical framework to the 709/744 area. The court first conducted a brief but thorough review of the jurisdictional history of the area from its creation as reservation in 1907 to its termination in 1911 to show the continuity of purpose in dealing with it. (Pet. 6a-13a.) The court followed this with a review of the legal standards defined in this Court's opinions. (Pet. 15a-21a.) It then summarized the record on each of this Court's factors. First, it conducted an historical factual and legal analysis of the operative language of § 25 of the Act of 1908 and of Executive Orders 1000/1284 which "restored [the former addition] to the public domain" to determine whether it was explicit language of reservation diminishment as of 1907-11. (Pet. 22a-47a.) Concluding that it was suggestive of diminishment but not dispositive, the court then addressed the surrounding circumstances and legislative history. The court studied the legislative history of Section 25 of the Act of May 29, 1908, and weighed internal communications of the Indian Office, communications between the Indian Office and the President, communications between the executive branch and Congress, and communications with the public, all during the relevant 1907-11 period. (Pet. 6a-13a, 47a-54a.)

Applying the standard fixed by this Court, the court of appeals concluded on the basis of its analysis of the first two factors that the reservation status of the area

terminated as of 1911. (Pet. 53a-54a.) The court then carefully addressed the other two factors in this Court's analytical structure, subsequent congressional and executive actions and the subsequent demographic history. The court determined that these reinforced the conclusion that the area had lost reservation status after 1911. (Pet. 54a-82a.)

This Court has established a framework for deciding reservation termination issues. The court of appeals faithfully followed that framework. The thorough and detailed legal and historical analysis in its 82-page opinion is a treatise on the jurisdictional history of this former addition.[8] This case is not appropriate for review by this Court.

II. THE DECISION BY THE COURT OF APPEALS THAT THE 709/744 AREA, ADDED TO THE NAVAJO RESERVATION IN 1907 TEMPORARILY AND FOR A LIMITED PURPOSE, LOST ALL RESERVATION STATUS WHEN IT WAS RESTORED TO THE PUBLIC DOMAIN BY 1911 IS CORRECT AS A MATTER OF LAW AND FACT.

A. Operative Language of the 1908 Act

Section 25 of the Act of 1908 and Executive Orders 1000 and 1284 used the same operative language in

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[8] It is noteworthy that the court of appeals heard two appeals on the issue of the reservation status of the 709/744 area. This case and *Blatchford v. Sullivan* (*see infra* § III), were argued at the same time with different records, different briefs, different counsel, and conflicting decisions from different federal district court judges in New Mexico. Thus, the legal and factual issues were presented with unusual thoroughness.

terminating the 709/744 area: "restore to the public domain." The court of appeals concluded that this was not "explicit language of termination," but "merely *suggest[ed]* changed boundaries . . . . " (Pet. 53a.) The Commission agreed with this proposition in its brief to the court of appeals:

> Judge Mechem [District Judge] was correct: use of the term "restore to the public domain" is "evidence of diminishment," slip op. at 5, but is not dispositive.

Answer Brief of Appellees, p. 36.

The Commission now asserts that this Court held in *Solem v. Bartlett* that this language is of "no special significance." (Pet. 21-22.) This is wrong. In *Solem*, this Court considered the import of the words "public domain" appearing not as the operative language, but as an "isolated phrase" in a separate section of the statute. The Court concluded that, while this phrase "[u]ndisputedly" supported the view that the reservation had diminished, it could not be dispositive when its position in the statute was balanced against other evidence. 465 U.S. at 474-75. The court of appeals' decision here is consistent with *Solem v. Bartlett*.[9]

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[9] Should the Petition be granted, P&M would show in support of the judgment below that prior decisions of this Court and other public land law authorities recognize that the term "restore to the public domain," used as the operative language in the 1908 Act and the Executive Orders, demonstrated a clear intent to terminate all reservation status for the 709/744 area. *E.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 589, dissent at 618.

B. Surrounding Circumstances/Legislative History

Where the statutory language is not dispositive, *Solem v. Bartlett* and its predecessors direct a court to consider the surrounding circumstances of the act and its legislative history – including both congressional and executive actions. *E.g., Solem v. Bartlett*, 465 U.S. at 476-78; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 590-94, 602-03; *DeCoteau v. District County Court*, 420 U.S. at 433-43.

The court of appeals did precisely what this Court has mandated. It conducted a detailed analysis of the government's treatment of the 709/744 area from its creation as a temporary addition in 1907 to its termination by 1911. The court concluded that the record revealed "unequivocal evidence of a widely held, contemporaneous understanding that the purpose of 709/744 was temporary and limited" and that "the reservation would shrink as a result of the restoration of unallotted lands to the public domain."[10] (Pet. 53a, 80a.) This Court has held

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[10] The Commission argues (Pet. 20-21 n. 29) that the historian who testified on P&M's behalf stated that the surrounding circumstances did not "unequivocally" show an understanding that the reservation would terminate. This is not accurate. Dr. Lawrence Kelly, a recognized expert on Navajo history, testified that if an historian read *post-1911* events backward, *i.e.*, if he started with a premise and looked for supporting events, he could find ambiguity in that *post-1911* period. (Tr. 1531-32.) As to *pre-1911* events, the second factor in this Court's analytical framework, Dr. Kelly was unequivocal: there was no intent in the Executive or Congress to leave the area in reservation status after 1911. (Tr. 1306-08.)

that, where the operative language of the Act suggests diminishment and the surrounding circumstances reveal an unequivocal understanding to that effect, a reservation terminates. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 586-87, 603; *DeCoteau v. District County Court*, 420 U.S. at 444-45.

The Commission urges that the court of appeals' consideration of executive branch sources improperly expanded legislative history and violated this Court's prior decisions. (Pet. 17-19.) In fact, the court of appeals carefully studied the legislative history of Section 25 of the Act of 1908. It found that both the Senate and the House acted to effectuate the Interior Department Office of Indian Affairs' intent that this should be only "a temporary reservation" and should last only "until such time as the Indian occupants could be allotted." H.R. Rep. No. 1663, 60th Cong., 1st Sess. 1-2 (1908). (Pet. 10a-12a, 52a-53a.)

Moreover, this Court's decisions do not limit analysis under this second factor to legislative history. To the contrary, they require that a court review the "surrounding circumstances," *i.e.*, the full executive and legislative record of actions leading to passage of the statute terminating the reservation. *Solem v. Bartlett*, 465 U.S. at 471 ("events surrounding the passage of a surplus land Act"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 587 ("[i]n all cases, 'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history' are to be examined"); *id.* at 590-603 (review of internal and external communications of Indian Office and negotiations with the tribe); *DeCoteau v. District County Court*, 420 U.S. at 444 ("the Court requires that the 'congressional determination to terminate . . . be clear from the surrounding circumstances and

legislative history' "); *id.* at 433-38 (review of negotiations with tribe and other Interior Department actions leading up to the legislation). The court of appeals' analysis is absolutely consistent with this Court's mandate.[11]

C. Subsequent Congressional and Executive Actions

The court of appeals' examination of this Court's third factor – subsequent congressional and executive actions – is also careful, detailed, and correct. In reviewing the mass of documents in the record, the court properly distinguished "consistent official pronouncements" (Pet. 55a), "consistent and clear interpretation" (Pet. 72a), and "explicit statements . . . made in the context of management or policy decisions specifically addressing land status" (Pet. 73a-74a), all of which treated the 709/744 area after 1911 as not having any reservation status, from other, non-jurisdictional documents after 1911 which referred to the area as "reservation."

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[11] It is the Commission which has confused the analysis of this second factor by discussing post-1911 documents as a part of the pre-1911 legislative history. The Petition states that there are "hundreds of contemporary official references" to the area as reservation. (Pet. 18.) While there are many such references, they are all in *post-1911* documents, as the pages cited in the opinion below will confirm, and have no place in an analysis of legislative history. This Court's second factor addresses events leading up to the termination actions. In this case, that would conclude in January 1911, when the western part of the New Mexico area was restored to the public domain. The court of appeals properly evaluated these post-1911 documents under its analysis of this Court's third factor, subsequent congressional and executive action.

This Court has not required that "subsequent actions" be free from ambiguity. In the two cases in which this Court found reservations to have been diminished, the unsuccessful tribal advocates cited documents very similar to those presented by the Commission as bases for concluding that reservation status had not terminated. This Court refused to accept those documents as persuasive. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 603-05 and dissent at 629 n.21 (appropriations acts and other congressional and administrative actions); *DeCoteau v. District County Court*, 420 U.S. at 442-43 (maps in annual reports and elsewhere, Interior Department memoranda, and appropriations acts). Specifically, the Court concluded: "No consistent pattern emerges. The authors of these documents appear to have put no particular significance on their choice of a label." *DeCoteau v. District County Court*, 420 U.S. at 443 n.27. The court of appeals here conducted the same type of analysis and reached the same conclusion. (Pet. 54a-80a, 75a n.41.)

D. Subsequent Demographic Information

After evaluating the Court's fourth factor – subsequent demographics of the 709/744 area – the court of appeals correctly concluded that, although the population and land use of the area is predominantly Navajo, government administration treats the area as non-reservation. The State of New Mexico, the federal government, and the Navajo Tribe all fund education and social services, and exercise criminal jurisdiction within their respective spheres. (Pet. 81a-82a.)

The Commission's Petition focuses principally on subsequent demographic issues, which, as this Court has cautioned, are "of course, an unorthodox and potentially unreliable method of statutory interpretation." *Solem v. Bartlett*, 465 U.S. at 472 n.13. Nevertheless, the Commission urges review by this Court on the basis of the "Indian character" of the 709/744 area and arguments that the court of appeals' decision has rendered the area "ungovernable" and has created "jurisdictional uncertainty." (Pet. 10-15.)

The Commission misstates the situation. The court of appeals' decision does not change the long-standing governance of the area. The federal, state and tribal governments have administered the 709/744 area as a checkerboard since the turn of the century. Congress chose that status in 1908 and has subsequently rejected numerous attempts to change it. The only "uncertainty" is that created by the tribe's recent assertion, contrary to 80 years of history, that the area is a reservation.[12]

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[12] The Commission also urges review because lower courts and federal agencies are supposedly in conflict on the jurisdictional status of the area. (Pet. 15-17.) There is no conflict requiring action by this Court: (1) *Navajo Tribe v. Holyan*, 1 Navajo Rptr. 78 (Ct. App. 1973) and the state trial court decision in *Blatchford v. Gonzalez*, 100 N.M. 333, 670 P.2d 944 (1983), *cert denied*, 464 U.S. 1033 (1984), did not hold that the 709/744 area is in reservation status, but addressed only the issue of whether a locale within the 709/744 area was a "dependent Indian community" under 18 U.S.C. 1151; (2) the court of appeals distinguished but did not reject its earlier decision in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (*en banc*), *cert. denied*, 479 U.S. 994 (1986) (Pet. 30a-34a); (3) the United States' position is clear that the 709/744 area is

(Continued on following page)

The Commission is really urging, as it did below, that the judiciary should create a *de facto* reservation in 1990, overruling the express intent of Congress and the Executive in 1907-11. However, creation and termination of Indian reservations are matters of congressional and executive intent; the role of the judiciary is to determine that intent. As this Court has emphasized:

> [O]ur task here is narrow one. . . . [W]e cannot remake history.

Rosebud Sioux Tribe v. Kneip, 430 U.S. at 615 (citing *DeCoteau v. District County Court*, 420 U.S. at 449).

The court of appeals rejected the Navajo Tribe's request for a *de facto* reservation. (Pet. 82a.) This Court need not review that decision.

III. THE UNITED STATES AGREES THAT THE 709/744 AREA DOES NOT HAVE RESERVATION STATUS.

The United States filed a brief *amicus curiae* before the court of appeals in the companion case to this, *Blatchford v. Sullivan*, 904 F.2d 542 (10th Cir. 1990), asserting that the 709/744 area lost all reservation status in 1908/1911 when the lands were restored to the public domain. *Blatchford* is a criminal case in which an individual convicted by New Mexico for a crime committed within the

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not reservation – *see infra* § III. Thus, the only conflict on the issue the Commission seeks to bring to this Court – the reservation status of the 709/744 area – was between two judges of the United States District Court in New Mexico. That conflict was resolved by the court of appeals' decision.

709/744 area sought *habeas corpus* relief. The defendant asserted that New Mexico had no jurisdiction to try him on the grounds, *inter alia*, that the area continued in reservation status. The district court (Bratton, J.) held that the 709/744 area was not reservation. (Pet. 91a-113a.) The issue on reservation status in *Blatchford* is the same as in this case; the records are similar but not identical; the cases were consolidated for argument but not decision. The court of appeals stated that its decision on reservation status in this case decided that issue in *Blatchford*.[13] 904 F.2d at 543.

In its brief, the United States concluded:

> The land on which Blatchford allegedly committed the crimes for which he was convicted in state court was only temporarily withdrawn from settlement under the 1907 Executive Order. The subsequent executive orders restored to the public domain all lands that had not been allotted to the resident Indians. The language of the executive orders and the contemporaneous documents demonstrate that the restored lands are not within the boundaries of the Navajo Reservation.

Brief for the United States as Amicus Curiae, p. 20.

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[13] Counsel for Blatchford has previously sought and obtained from this Court an extension of time within which to file a petition for certiorari. Application No. A-263, Oct. 5, 1990. Thus, the same issue of reservation status as the Commission raises here will be presented to this Court on petition for writ of certiorari in *Blatchford*.

CONCLUSION

This is not a case which requires review by this Court. In its past decisions, the Court has delineated a clear framework for deciding issues of reservation termination. With the benefit of an historical record developed in two separate cases (this and *Blatchford*), the court of appeals followed this Court's framework for decision to the letter. The decision it reached, that Congress clearly intended that this temporary addition to the Navajo Reservation would lose all reservation status when the lands were restored to the public domain, is correct.

Respondent respectfully asks that the Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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